GREY ADVERTISING (M) SDN BHD

v.

WONG YOKE YING & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[JUDICIAL REVISION NO: R1-25-160-2003]
11 MAY 2006

LABOUR LAW: *Employment - Constructive dismissal - Company evinced intention to employ another employee similar to respondent's job capacity and to revise respondent's job description - Whether respondent prematurely walked out of her job - Whether Industrial Court's finding in favour of respondent was justified*

The first respondent who was a Financial Manager with the applicant company, succeeded in her claim for constructive dismissal in the Industrial Court (the second respondent). She was awarded a sum of RM388,000. Hence, this application by the applicant for an order of *certiorari* to quash the award of the Industrial Court.

Held (dismissing the application):

(1) At the material time, the first respondent was the Finance Manager and Head of the Finance Department. With the impending appointment of the new Finance Director, she would no longer be the Head of the Finance division. Therefore, the applicant's action did have a detrimental effect on the first respondent's terms of employment. (para 10)

(2) The Industrial Court was right in concluding that the applicant failed to substantiate its contention that it had wanted to exercise its rights as an employer to do what is best for the company. (para 13)

(3) Based on the evidence adduced before the Industrial Court, the Industrial Court was justified in concluding that the case was related to performance and not a case where the first respondent had prematurely walked out of her job. (para 15)

(4) The Industrial Court had applied the correct test for constructive dismissal and had identified the proper legal principle and law applicable on cases of constructive dismissal. (para 16)

Case(s) referred to:
Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 298; [1988] 1 CLJ (Rep) 45 ***(refd)***

For the applicant - T Thavalingam; M/s Zaid Ibrahim & Co
For the 1st respondent - LG Seah; M/s Lobo & Assoc

Reported by Usha Thiagarajah

JUDGMENT

Raus Sharif J:

[1] This is an application by Grey Advertising (M) Sdn Bhd ("applicant") for an order of *certiorari* to quash the Industrial Court Award No. 551 of 2003, handed down by the Industrial Court on 22 July 2003. In the award the Industrial Court held that the first respondent had been constructively dismissed and awarded her a total sum of RM388,000 comprising the following:

(a) Backwages from the date of dismissal (13 October 1999) till the last date of hearing (12 November 2002) subject to a maximum of 24 months:

RM8,000 x 24 = RM192,000

(b) Payment *in lieu* of reinstatement on the basis of one month salary for each year of completed service (1 January 1978 till 13 November 2002):

RM8,000 x 24 ½ = RM196,000

[2] The relevant facts leading to this application are these. The first respondent joined the applicant with effect from 1 March 1978 as an Account Assistant. She was subsequently promoted as an accountant with effect from 1 July 1986. In December 1989, she was again promoted and this time to the post of Financial Manager reporting to the Managing Director.

[3] On 27 September 1999, the Managing Director of the applicant, Mr. John Burbidge (COW1) wrote to the first respondent (following a performance appraisal session with the first respondent on the previous day) expressly informing the first respondent of the following:

(i) that he wanted to revise her job description and appoint a new Finance Director or 'someone else' to whom the first respondent had to report;

(ii) that the new appointee will assume overall responsibility for financial management.

[4] The first respondent considered the action of COW1 to be a fundamental breach of her contract of employment and therefore considered herself dismissed by the applicant.

[5] The Industrial Court found in favor of the first respondent. Hence, this application by the applicant.

[6] Before me, it was submitted by applicant that the Industrial Court erred on the following:

(a) Took into account irrelevant considerations when it held that the applicant's case before it was related to the performance of the first respondent when it was a case where the first respondent had prematurely walked out on constructive dismissal without any basis.

(b) Acted on no evidence when it:

(i) held that the first respondent was requested to reduce her job function;

(ii) held that the appointment of Finance Director amounted to the applicant evincing an intention no longer to be bound by the contract of employment; and

(iii) held on no basis that discussing the first respondent's terms and conditions with her meant that her terms of employment in the future would be reduced.

(c) Failed to take into account relevant considerations in that it failed to appreciate that there was at the material time no change to the first respondent's duties and responsibilities.

(d) Wrongly applied the law of constructive dismissal and compared the current facts to the case of *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92.

[7] The first respondent refuted the applicant's contentions and basically contended that the Industrial Court's award was proper and valid and does not merit judicial review intervention.

[8] It is trite law in a constructive dismissal claim that the burden lies on the first respondent, as an employee, to prove a fundamental breach or an intention on the part of applicant that it no longer wishes to be bound by the contract of employment. In the present case the Industrial Court addressed the issue on the following words:

> ... A scrutiny of the claimant's job description for the post of Finance Manager dated 1.4.1997 (exhibit CO 6A) reveals that she is "to manage the finances of the Company and to be responsible for a department ... and to lead the Finance Division ...". Further her job description expressly states that her reporting relationship is directly to the Managing Director on all issues on finance. However with the appointment of the new Finance Director, all this will change. It would appear that the Company wanted the claimant to agree to a reduction of her job-scope which means that she is being relegated to a position of lesser responsibilities albeit on the same terms and conditions of service. It is therefore clear that the new Finance Director's employment would have a detrimental effect on the claimant's terms of employment.

[9] The Industrial Court further stated as follows:

> ... Further her job description expressly states that her reporting relationship is directly to the Managing Director on all issues on finance. However with the appointment of the new Finance Director, all this will change. It would appear that the Company wanted the claimant to agree to a reduction of her job-scope which means that she is being relegated to a position of lesser responsibilities ...

[10] I have no reason to review the above findings. It is clear that at the material time, the first respondent was the Finance Manager and Head of the Finance Department. With the impending appointment of the new Finance Director, the first respondent's position will be relegated, whereby she has to report to the Finance Director and no longer to the Managing Director.

In effect, she will be no longer be the Head of Finance Division. Therefore, the applicant's action had a detrimental effect on the first respondent's terms of employment.

[11] It appears to me that the whole tenor of the applicant's contention was that the applicant had merely wanted to exercise its rights as an employer to do what is best for the company. The applicant in its statement in reply pleaded as follows:

> the Company had no intention of dismissing her and that it had merely intended to engage a Finance Director whose role would cover broader financial management issues as per the original description designed for the Head of the Finance Unit of the Company ...

[12] On the above pleading, the Industrial Court had made a finding of fact that the applicant had failed to substantiate the aforesaid contention or defence because the applicant had failed to adduce the necessary original job description, which it claimed it wanted the new Finance Director to fulfill. The Industrial Court said it in the following words:

> As for the issue that the Company merely wanted to recruit a Finance Director whose role would cover broader financial management issues as per the original job description designed for the Head of Finance Unit, COW1 wrote that he had the intention of employing someone who can fulfill the original job description which the claimant had agreed on in July 1996. However this original job description document was not produced and hence the Court is unable to compare whether the Company had given the claimant less job function that the original description for the position ...

[13] To me, the Industrial Court cannot be faulted in coming to the above conclusion. Clearly the applicant had failed to produce the necessary and crucial evidence for the Industrial Court to consider. Accordingly, I find there is no merit on applicant's contention that it had merely wanted to exercise its rights as an employer to do what is best for the company.

[14] On the issue whether this case is a performance related, Industrial Court addressed it in the following words:

> It is pertinent to note that although the Company's assertion in its submission that the issue before the Court is "not performance related", the Company's evidence through COW1 and COW2 (the Resource Director) indicates otherwise. COW1 had stated in the

> letter of 5.10.1999 that he will review her performance in 3 month's time and in the meantime, he will proceed to employ the Finance Director. COW2's evidence is that COW1 was dissatisfied with the claimant's performance of her key responsibilities. Hence, it appears that the Company's case is indeed performance related ... .

[15] I have no reason to review the above findings. To me, the findings were based on evidence. It would be contrary to all the established legal principle relating to judicial review if the findings of facts based upon the evidence presented were liable to be reopened or reevaluated by this court. Accordingly, I am of the considered opinion that the Industrial Court was justified in concluding that the case before it was related to performance and not a case where the first respondent had prematurely walked out of her job.

[16] Finally, I am of the view that the Industrial Court had not apply the wrong test for constructive dismissal. To me, the Industrial Court had correctly identified the proper legal principle and the law applicable on cases of constructive dismissal. On this issue the Industrial Court held as follows:

> The next question that has to be dealt with is whether the Company had already evinced an intention no longer to be bound by the terms of the claimant's contract at the time the claimant left the Company. COW1 in his cross-examination agreed that the Company wanted to revise the claimant's existing contract of employment with her agreement but had in fact already made up his mind to appoint a new Head of Finance irrespective of her agreement or not. Hence the claimant was left in not doubt that the Company fully intended to employ a Finance Director and on his appointment there would be a reduction in her terms of employment as a result of the change in job functions. When the claimant requested COW1 to revoke his direction that she revise and reduce her job description in her letter of 4.10.1999 and the Company through COW1 refused to accede to her request it clearly shows that the Company had evinced an intention not to be bound by the contract any longer. The claimant cannot be said to act prematurely and "jumped the gun" because the Company had confirmed it's course of action in the letter of 5.10.1999 (exhibit CO 10). The Court is of the considered opinion that the claimant was entitled to terminate her contract and leave because the Company had evinced an intention no longer to be bound by the contract of employment.

[17] The Industrial Court further held:

> It is abundantly clear that the Company by its conduct had intimated an intention not to be bound any longer by the original and unchanged terms of contract. The claimant had rightfully left the Company at that point of time although nothing was actually carried out or implemented yet by the Company in the appointment of the Finance Director. As rightfully pointed out by the claimant in her written submission this was what happened to the workman in the *Wong Chee Hong*'s case *(supra)* when he acted on the employer's evinced intention and did not report for the new assignment.

[18] From the above, it is clear that the Industrial Court had applied the contract test as laid down in the case of *Wong Chee Hong (supra)*. Hence, the contention of the applicant that the Industrial Court had wrongly applied the law of constructive dismissal is without any basis.

[19] In conclusion, I am of the view that the findings of the Industrial Court were not perverse or irrational. Neither could I say that the findings were based on no evidence or findings that were so unreasonable that no reasonable person similarly circumstanced could have arrived at such findings.

[20] Accordingly the applicant's application is dismissed with costs.